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Docket No. 275

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION,

Petitioners,

v.

SECURITIES & EXCHANGE COMMISSION, CITIES SERVICE COMPANY, ARKANSAS NATURAL GAS CORPORATION, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY, CLASS A COMMON STOCK COMMITTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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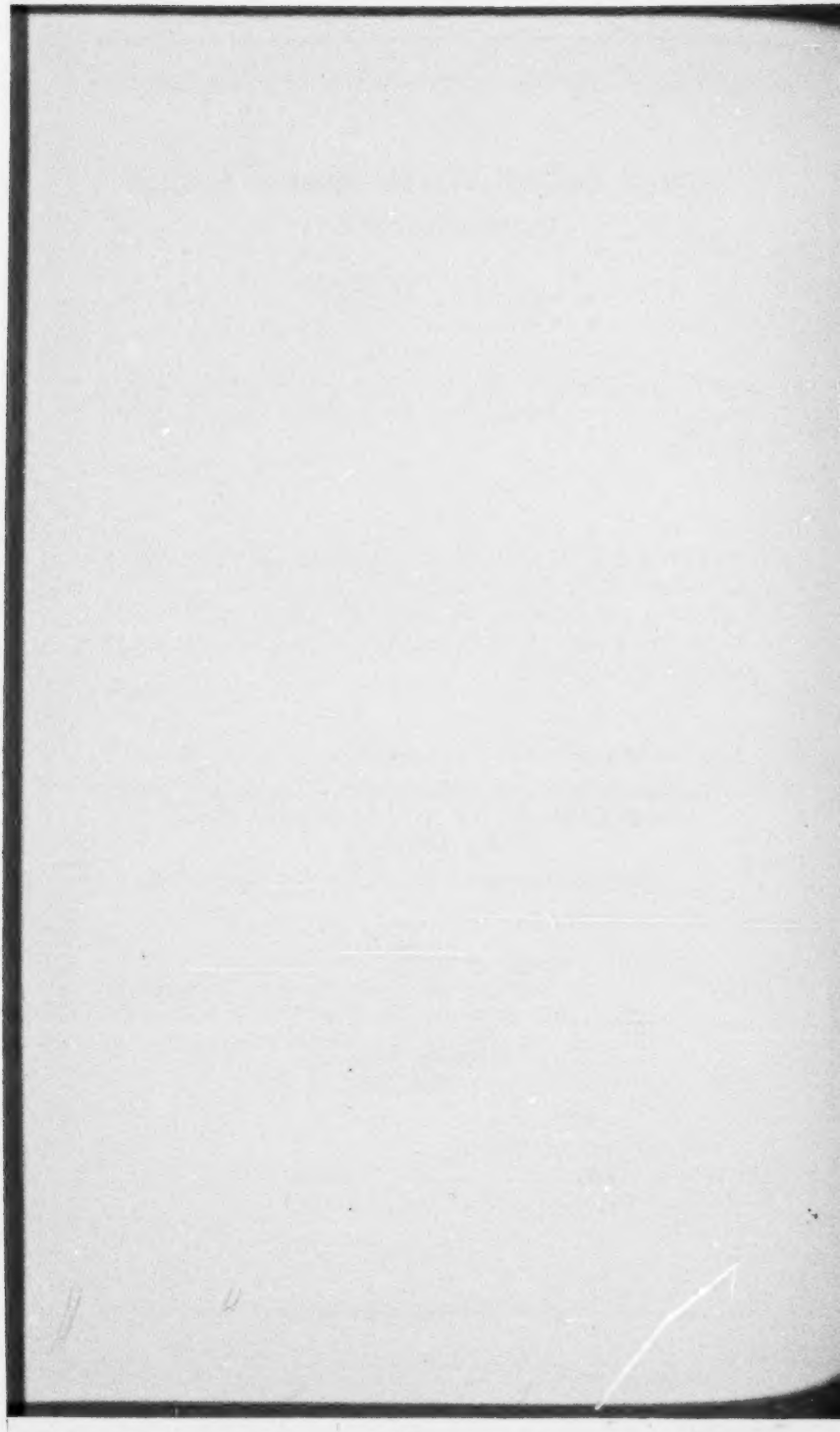

INDEX TO PETITION

	PAGE
Summary Statement of the Matter Involved	1
Jurisdiction	5
Questions Presented	6
Reasons for Granting the Writ	6
Conclusion	7

INDEX TO BRIEF

Opinions of Courts Below	1
Jurisdiction	1
Statement of the Case	2
Specifications of Errors to be Urged	7
ARGUMENT:	
Summary of Argument	8
POINT I —The Common stockholders are aggrieved	9
POINT II —The Court has the right and duty to examine the Commission's conclusions of law	16

AUG 9 1965

217307

PAGE

POINT III—The marketing of the Arknat Class A stock by Cities involved no breach of fiduciary duty to the purchasers.. 19

POINT IV—The Class A stockholders have no "class" Claim 23

(a) Even the initial purchasers of Class A stock did not have a class claim; but rather separate actions for fraud and deceit .. 25

(b) No right of action for Cities market manipulation devolved upon Class A stockholders who are transferees of the original purchasers 27

POINT V —Both classes of stockholders having equal contractual rights are entitled and required by law to receive equal treatment 30

CONCLUSION 33

Cases Cited

PAGE

Abel v. Paterno, 245 App. Div. 285 (1935), 281 N. Y. Supp. 58 29
American Insurance Co. v. City of Avon Park, 311 U. S. 138, 146, 61 S. Ct. 157 21-22
American Surety Co. v. Jones, 51 N. E. 2d 122, 384 Ill. 222 14
Ayer v. Kemper (2nd Cir., 1931), 48 F. (2d) 11, 14, cert. den. 284 U. S. 638 (1931) 27

Beachler v. Ford, 60 N. E. 2d 330, 337 15

Case v. Los Angeles Lumber Co. (1939), 308 U. S. 106, 60 S. Ct. 1 32
Cohan v. Elder, 118 F. 2d 850 (C. A. 9, 1941) 14

Elliott v. Kern (1928), 90 Ind. App. 453, 161 N. E. 662, 664 29
George Brenner, et al v. Title Guarantee & Trust Co., 276 N. Y. 230, 11 N. E. 2d 890 (1937) 26
Glas v. People, 102 N. E. 763, 259 Ill. 332 14
Gough v. Satterlee, 32 App. Div. 33 (1898), 52 N. Y. Supp. 492 20

Hackner v. Guaranty Trust Co. (2nd Cir., 1941), 117 F. (2d) 95, 97-8, cert. den. 313 U. S. 559 (1940) .. 27
Huston v. Ohio & Colo. Smelting & Refin. Co. (1917), 63 Colo. 152, 165 Pac. 251, 252 29

Inter-Ocean Casualty Co. v. Lecony Smokeless Fuel Co., 123 W. Va. 5411 (1941) 20
In re Standard Gas & Electric Co. (1945), 59 F. Supp. 274, 279, aff'd in pt. (3rd Cir., 1945), 151 Fed. (2d) 326, cert. den. 327 U. S. 796, 66 S. Ct. 820 .. 32

PAGE

In the Matter of Engineers Public Service Co. (December 5, 1946), H. C. Rel, 7041; aff'd sub. nom. 32
In re Midland United Co. (D. C. Del., 1944), 58 F. Supp. 667, 685, app. dism'd 141 Fed. (2nd) 692 (C. C. A. 3), 1944 32
In re Associated Gas & Electric Co., 53 F. Supp. 107, 112 (S. D. N. Y., 1943), affirmed sub. num. Elias v. Clarke, 143 F. (2d) 641, cert. den. 323 U. S. 778, 65 S. Ct. 191 29
In the Matter of Stanley Clarke, Trustee of Associated Gas & Electric Co. (April 15, 1944, H. C. Rel. 4985), 45 29

Kennedy v. Benson, 54 Fed. 836, 838 29

Madget v. Madget, 85 Ohio App. 18 (1949) 20
Marine Harbor Properties, Inc. v. Manufacturers Trust Co. (1942), 317 U. S. 78, 63 S. Ct. 93 32
Matter of Green Bus Lines, 166 Misc. 800 (N. Y.) .. 13

Otis & Co. v. S. E. C. (1945), 323 U. S. 624, 637, 65 S. Ct. 483 32

Pennsylvania Co., etc. v. Deckert (3rd Cir., 1941), 123 F. (2d) 979, 983 24
Pepper v. Litton, 308 U. S. 295, 307, 60 S. Ct. 238 .. 21
Pierce v. Gould, 9 N. E. 568 15

Reed v. Allen, 286 U. S. 191, 209 9

S. E. C. v. Central Ill., 338 U. S. 96, 126 (1949), 69 S. Ct. 1377 14
S. E. C. v. Chenery Corporation, et al., 318 U. S. 80, 63 S. Ct. 454 17
S. E. C. v. Cogan, 201 F. 2d 78, 85 (Dec. 22, 1952) .. 18

PAGE

Standard Oil Co. v. Apex Oil Corp. (1950), 190 Tenn. 376, 229 S. W. (2d) 775, 776 31
Steele v. Brazier (1909), 139 Mo. App. 319, 123 S. W. 477, 482 29

U. S. v. Joliet & Chicago R. Co. (1942), 315 U. S. 44, 48, 62 S. Ct. 442 31

Wheatley, et al. v. A. I. Root Co., et al., 72 N. E. 2d 482 (Ohio Court of Appeals, Medina County, 1945) 26
Willcox v. Harriman Securities Corp., 10 F. Supp. 532 (S. D. N. Y., 1933) 26

Zahen v. Transamerica Corp. (3rd Cir., 1947), 162 F. (2d) 36 27

MISCELLANEOUS PUBLICATIONS

114 A. L. R. 1015 26
1 Bogert, Trusts, 3, 502 20
1 Restatement, Trusts, Sec. 74 (1935) 20
37 C. J. S., Frauds, Section 60(b), page 344 28
Cook on Corporations (Vol. II, 8th Ed., Sec. 355, p. 1294) 28
Finletter, Law of Bankruptcy Reorganization, 1939 (p. 467) 30

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of

ARKANSAS NATURAL GAS CORPORATION, CITIES SERVICE COMPANY, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY.

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petition of the Public Common Stockholders' Protective Committee respectfully shows:

I

Summary Statement of the Matter Involved

The Securities and Exchange Commission, pursuant to Sections 11(e) and 18(f) of the Public Utility Holding

Company Act of 1935, filed an application in the United States District Court for the District of Delaware for an order approving and enforcing an amended plan of reorganization and simplification of Arkansas Natural Gas Corporation ("Arknat"), a registered holding company and subsidiary of Cities Service Company ("Cities"), which amended plan was approved by findings and opinion and order of the Commission dated October 1, 1952.

By order dated January 29, 1953 said plan was approved by Hon. Albert B. Maris, United States Circuit Judge sitting as a District Court. From that order petitioners appealed to the Court of Appeals for the Third Circuit which on May 28, 1953, affirmed the order of the District Court

The sole question presented (and purposely so, in order to avoid any possible confusion with other details of the plan) was whether the two classes, Public Common stockholders and Public Class A stockholders of Arknat, whose contractual rights were absolutely identical (except that the Public Common stockholders had the right to vote) could receive disparate and discriminatory treatment without any legal justification or basis.

In the course of the proceedings before the Commission numerous claims were asserted by both stockholders' committees against Cities because of its position as controlling and dominant stockholder in Arknat. The amended plan provided that Cities would pay 25¢ per share to the Public Common stockholders of Arknat and $1.50 per share to the Public Class A stockholders of Arknat in full settlement of all claims against Cities in a derivative capacity or otherwise. The record establishes that, before the Commission, Cities resisted this discrimination between the two classes of stockholders and asserted that both classes should be afforded identical rights in accordance with the charter provisions. Thereafter, before the District Court, Cities accepted the Commission's decision and joined with it in

asking enforcement of the Plan, claiming then with the Commission that the payment of $1.25 per share additional to the Class A stockholders was a "private settlement" of their alleged class claim based on market manipulation by Cities in 1929 in connection with the public sale of that stock.

Petitioners' contention then and now is that there is no valid legal basis for any such claim on the part of the present transferee holders of the Class A stock, constituting over 94 % of the total, and that in the absence of such valid legal basis, the additional payment to the Class A stockholders is discriminatory and illegal. This position has never been successfully refuted by any of the parties in this proceeding or in the opinions of the courts below.

Without some valid legal basis, the alleged settlement becomes merely a technique for differentiation and discrimination between stockholders of equal rights. The District Court and the Circuit Court, by accepting the alleged "settlement" at face value and refusing to examine the alleged basis, make the injury irreparable and not even subject to review.

To the repeated challenge of the Public Common Stockholders Committee to have any of the parties submit a single authority which would sustain the right of the Commission to discriminate between the two equal classes of stockholders the sole defense offered by way of avoidance rather than by refutation was adopted by the Circuit Court and stated in its opinion as follows (68a):

> "We think there is no merit in the position taken by the appellants here. They are not hurt by anything which has been done. We fail to see how they have any more standing to complain than would any stranger on the street who read about the litigation and disapproved the result."

On a similar basis the victim of an assault who disapproved the newspaper report of the incident might be held to be without legal recourse.

Misconceiving petitioners' position, the Court of Appeals has ruled that because they did not question the adequacy of the settlement of the derivative claims (as to which there were genuine questions of fact making the Commission's determination and settlement, under the cases, not subject to further review by the District Court) petitioners had no interest in the purported settlement made with the Class A stockholders for their so-called class claim. The Court of Appeals failed to look behind the first roadblock and gave complete faith and credit to a label (conjured up after the fact) that a "private settlement" was made with Class A stockholders which in no way diluted the interest of the Common stockholders.

The record abundantly establishes that

(1) the Commission, not Cities, made the disparate allocation between the two classes of stockholders,

(2) Cities from the beginning resisted any such allocation, clearly refuting any concept of a private offer of settlement to the Class A stockholders,

(3) the alleged class claim is based upon market manipulation by Cities in the sale of the Class A stock in 1929, although it obviously and of necessity had to similarly manipulate the market in the oustanding Common stock, and although 94.11% of the present Class A stockholders purchased their shares after the manipulation period, and

(4) claims exceeding $50,000,000 were asserted against Cities which as a matter of law could only be derivative.

The law is clear that (1) fraud and misrepresentation practiced at varying times upon different stockholders give rise to individual causes of action and not class claims (except a "spurious" class claim, which is merely a procedural device to avoid multiplicity of suits where common questions of fact or law exist) and (2) transferees of stock to not inherit causes of action for fraud and misrepresentation practiced upon their predecessors.

So far, none of the parties to this proceeding or the courts below cited any authority controverting the above statement of the law. The argument heretofore advanced rather naively is that if Cities chooses to give away a fund to Class A stockholders why do the Common stockholders complain?

The view taken by the District Court and the Circuit Court that the Public Common Stockholders Protective Committee are in effect interlopers and have no interest in the proceeding completely ignores the background of this proceeding and relies entirely upon the form rather than the substance of the subject matter and makes rulings by administrative agencies, however unjustified or illegal, not subject to review by courts of law.

II

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and *Otis* v. *S. E. C.*, 323 U. S. 624.

The judgment of the Court of Appeals was entered on May 28, 1953 (66a).

III

Questions Presented

1. May stockholders of equal contract rights be treated differently in a Section 11(e) reorganization solely on the basis of a legally fictitious "class" claim?

2. Where an administrative agency has misapplied legal principles and made erroneous findings as a result, is it not the right and duty of this Court to correct such action?

3. Can the Commission create rights in transferee stockholders when they inherited none from their predecessors as a matter of law?

4. Is the mere assertion of a claim and its approval by the Securities and Exchange Commission sufficient to require its settlement and payment under a plan of reorganization although it is invalid as a matter of law?

IV

Reasons For Granting the Writ

1. The decision of the Court of Appeals that the Public Common Stockholders Protective Committee has no interest in a settlement made upon an erroneous and nonexistent legal basis, merely because an administrative agency has approved the settlement, involves an important question of federal law which should be settled by this Court.

2. The decision of the Court of Appeals that equal classes of stockholders can receive disparate treatment in a proceeding for simplification under Section 11(e) of the

Public Utility Holding Company Act of 1935 is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

3. The rulings of the Circuit Court and the District Court, by approving the settlement upon an asserted claim which has no legal or equitable existence, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons petitioners urge this application for certiorari be granted.

Respectfully submitted,

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Public Common Stockholders'
Protective Committee.

HAWKINS, DELAFIELD & WOOD,
FRANKLIN S. WOOD,
CLARENCE FRIED,
of Counsel.

Supreme Court of the United States

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of

ARKANSAS NATURAL GAS CORPORATION, CITIES SERVICE COMPANY, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY.

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE,

Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of Judge Maris (5a) is reported at 109 F. Supp. 522. The opinion of the Court of Appeals (R., p. 66a) has not yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28, U. S. C. Sec. 1254(1).

Statement of the Case*

On December 4, 1951, Arkansas Natural Gas Corporation ("Arknat"), a registered holding company under the Public Utility Holding Company Act of 1925 ("act"), in a Section 11(e) proceeding filed an amended plan of reorganization (the original plan was filed on January 26, 1950).

In the course of the proceedings it appeared that Cities Service Company ("Cities") owned about 75% of the common stock, about 24% of the Class A stock and about 40% of the preferred stock of Arknat and dominated and controlled its affairs. (S. E. C. Findings & Opinion, 62a p. 3).

On October 1, 1952 the Commission approved the amended plan in its findings, opinion, and order (62a).

An application for an enforcement order was made to the United States District Court for the District of Delaware and on January 29, 1953 pursuant to the opinion of United States Circuit Judge Maris, who was sitting as a District Judge in Delaware (109 F. Supp. 522), an order approving and enforcing the plan of reorganization was entered. The opinion of the District Court, the order entered thereon, and the findings and order and opinion of the Commission appear on pages 5a, 6a and 62a, respectively, of the appendix hereto.

---

* References are designated as follows:

To the pages in the printed appendix (a);
To the transcript of the testimony (T.);
To filed papers (not printed) by description and date of filing, and
To exhibits (not printed) by their identifying exhibit numbers or letters.

On February 27, 1953, the Public Common Stockholders' Protective Committee (petitioners herein) filed a notice of appeal by which they sought to review the action of the District Court and of the Commission approving the amended plan which discriminated in the treatment accorded to the public common stockholders as against the public Class A common stockholders.

On May 28, 1953 the United States Court of Appeals for the Third Circuit without considering the merits affirmed the order of the District Court merely on the ground that the Public Common stockholders were not aggrieved.

The amended plan provides that Cities shall pay 25¢ per share to the public common stockholders of Arknat and $1.50 to the public Class A stockholders of Arknat in full settlement of all claims, whether asserted against Cities by the stockholders in a derivative capacity or otherwise. The rights of the common and Class A stockholders according to the charter provisions were identical except that the common stockholders had the right to vote.

The issue on this application arises from the marketing and public distribution by Cities of 2,500,000 shares of Class A stock in 1929.

The following are the facts leading up to the sale of the Class A stock.

Arknat was organized on April 4, 1928, by the merger of two wholly owned subsidiaries of Cities together with a third company controlled by the so-called Benedum-Trees interests in Pittsburgh who were not affiliated with Cities. Pursuant to the merger agreement Arknat issued preferred and common stock of which Cities received 28% and 60% respectively and the balance was issued to the Benedum-Trees group. The total amount of common stock issued was approximately 4,084,000 shares without par value.

In March, 1929, Arknat authorized the issuance of 4,000,000 shares of Class A stock having the same rights as the common stock except that the Class A stock had no vote.

In May, 1929, Arknat sold the first block of approximately 1,021,000 shares of the Class A stock to holders of its common stock on a rights offering at $4.00 per share at the rate of one share of Class A stock for every four shares of common stock (38a).

Later in the month Arknat agreed to issue to Cities on its call, for public distribution, 2,000,000 more shares of Class A stock as follows:

1,000,000 shares at not less than $5.00 per share,
500,000 shares at not less than $6.00 per share, and
500,000 shares at not less than $7.00 per share.

In September, 1929, Arknat further agreed to sell to Cities on its call the balance of the authorized Class A stock at not less than $15.00 per share, but of this balance Cities took down only 500,000 shares. This made the total number of Class A shares taken down by Cities for public distribution for Arknat 2,500,000. This 2,500,000 shares of Class A stock, together with the 1,021,000 shares issued on rights to the common stockholders as mentioned above, substantially accounts for the total of 3,522,521.25 shares of Class A stock issued and outstanding at the time of filing of the amended plan by Arknat mentioned above.

The facts in this regard are succinctly stated in the opinion of Judge Maris as follows:

> "There is no substantial dispute as to what actually occurred in the distribution. Cities took and distributed 2,500,000 shares of the Class A stock, all but approximately 479,000 of the shares which Arknat had undertaken to issue upon call by Cities. The marketing was handled by Cities through Henry L. Doherty

& Co., fiscal agent for Cities. Doherty through its salesmen operating out of its offices throughout the United States offered and sold Class A stock to customers at the closing price of the previous day on the New York Curb Exchange. Shares were sold for cash and on the installment plan; the salesmen received commissions only if the purchaser held the stock for 60 days or longer. Cities, through a subsidiary, was simultaneously trading heavily on the Curb *in both the Class A stock and the common stock,** with purchases vastly exceeding sales, priced and timed so as to effect a maximum inflation of the market prices on which sales of the Class A stock by Doherty & Co.'s salesmen would be based.

"On June 1, 1929, the Class A and common stocks were quoted on the Curb at about 8¾. Four months later, in September 1929, the Class A stock reached a high of 24⅝ and the common stock a high of 26.

"During that period Cities was taking down from Arknat the 2,500,000 shares of Class A stock referred to above, and through the Doherty salesmen was selling to the public those shares and additional shares purchased on the Curb. On September 7, 1929, Cities took down the last block of 500,000 shares actually to be issued. The buying and selling by Cities through Doherty & Co. and its other subsidiary continued through the end of 1930; the number of shares traded dropped sharply after the market break in October 1929, rose sharply after January 1930, and then dropped off during the latter part of the year. By the end of 1930, when the distributing operation was terminated and an accounting had, the price was down to $5 per share.

The 2,500,000 shares of Class A stock were sold through Cities to net Arknat an aggregate of $21,454,234,

* Italics added.

or an average of approximately $8.58 per share (Com. Exs. 1, 52, 64). Prior to the commencement of the public sale of this stock in June, 1929, the common stock of Arknat had been selling on the public market in New York at an average price for the month of May of 6⅞ dollars per share, or a high of 8⅝ and a low of 5⅛ dollars per share (Badger Ex. 9, 156a). As mentioned in Judge Maris's opinion quoted above, on June 1, 1929, both the Class A and common stocks of Arknat were quoted on the New York Curb Market at about 8¾ (Com. Ex. 66, 40a).

Of the present Class A stockholders, 5.89% purchased their shares from June to September 1929 and 13.6% purchased their shares from April 1929 to December 1930 (Cities Ex. 30, 46a). Stated conversely 94.11% of the present Class A stockholders purchased their shares since September, 1929 (which was both the peak and substantially the end of Cities actual market manipulation)[1] and 86.4% have purchased their shares since December 1930, when Cities' distributing operation was finally terminated and it made its final accounting with Arknat (Com. Ex. 64; Com. F. & O. 62a, p. 36). Accordingly the Public Common Stockholders' Protective Committee urged that (depending on whether the actual period of manipulation by Cities or the full theoretical period until its accounting is taken as the measure) either 94.11% or 86.4% of the present Class A stockholders have no possible claim against Cities based on its market manipulation and no basis for different treatment than the public common stockholders on that score.

---

[1] "Cities purchased and sold to the public in direct retail sales an amount of Class A stock considerably in excess of the total of 2,500,000 shares it took down from Arknat. Cities purchased in the open market 2,621,959 additional shares, and by the time the entire operation was terminated on December 31, 1930, it had sold a total of 5,506,195 shares. From May 29 through September 1929 alone, Cities sold approximately 4,045,000 shares" (Com. Findings and Opinion, p. 35).

Nevertheless at the insistence of the Commission (Cities strongly opposed the payment in its briefs before the Commission), the amended plan provides for the payment by Cities of 25¢ per share to all public common and Class A stockholders of Arknat in settlement of all general and derivative claims and an additional payment of $1.25 to the public Class A stockholders because of its above manipulation of the market in the public sale of Class A stock, on the following grounds (not always or consistently urged):

A. Cities breached a fiduciary obligation to the Class A stockholders (Com. F. & O. 62a, pp. 48-9).

B. Special equities existed in favor of the Class A stockholders (Com. F. & O. 62a, p. 49).

C. A class claim enured to the benefit of the Class A common stockholders (Com. F. & O. 62a, p. 49).

We submit that as a matter of law none of the foregoing can be justified.

Specification of Errors to be Urged

The Court of Appeals erred in—

(1) holding that the Public Common stockholders are not aggrieved by approval of the amended plan,

(2) approving the amended plan providing for disparate and discriminatory treatment between two classes of stockholders whose legal rights are identical, and

(3) approving a settlement on a non-existent and illegal basis.

ARGUMENT

Summary of Argument

The basic question presented by this petition is whether a determination by an administrative body is so sacrosanct that it will be immune from review by the Courts regardless of how unfounded the basis for that determination may be.

Concededly the charter rights of the two classes of stockholders are identical. There can be no dispute that a very small proportion of the present stockholders purchased their shares of stock during the time when the alleged personal wrongs were committed. There has been no successful refutation by any of the parties to this proceeding or in the opinions of the Courts below that the present transferee holders of the Class A stock inherited no rights of action for fraud in the original sale of stock from their predecessors.

As a matter of law, therefore, no basis exists for differentiation among the vast majority of the present holders of the Common and Class A Stock.

This and other federal courts have held that the adequacy of a settlement approved by the Commission cannot be reviewed or questioned, but that principle has here been distorted and misapplied because under the guise of applying that principle the Commission acted as a prize court and divided a fund upon an illegal basis.

There is no need to conjecture what might have happened if the proper legal principles were applied. Since the entire picture is out of focus the first problem is to establish the proper starting point and place the integral parts in proper perspective. It is no answer to assert that the Public Common stockholders are not concerned because Cities has now capitulated and adopted the Com-

mission's allocation of the settlement fund and a label of private settlement or gift has been attached to the result. In *Reed* v. *Allen*, 286 U. S. 191, 209, Mr. Justice Cardozo said:

> "The quality of the remedy is to be determined by the end to be achieved, and not by any label, whether restitution or ejectment.
>
> "A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that omission he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow."

The foregoing applies with greater force in this proceeding because unless the blindfold is removed from the eyes of the Court so that the transaction may be recognized for what it is, the petitioners have no way out and are enmeshed in procedural rules and semantics which completely overlook the substance of the subject matter involved.

If the opinion of the Circuit Court is permitted to stand, unlawful discrimination among various classes of stockholders whose legal rights are identical will be fostered and the authority exercised by administrative agencies without any legal basis will go unchecked.

POINT I

The Common Stockholders are aggrieved.

The crux of the argument made by Cities, the Class A stockholders' committee and the Commission in the Court

of Appeals was summed up in the following last two paragraphs of the Commission's brief (p. 13):

> "The Common Committee objects only to the additional payment to be made under the plan to the Class A stockholders. This payment is to be made by Cities itself, and does not directly or indirectly reduce the participation of the public common stockholders in the estate of Arknat. No stockholder of Cities, and no class A stockholder of Arknat, contends that the settlement is either excessive or inadequate.
>
> "The common stockholders of Arknat have no legitimate concern with either the excessiveness or the inadequacy of the proposed payment by Cities to the class A stockholders, based upon the separate claims against Cities asserted on behalf of the class A stockholders as such. They would be affected by the settlement only if it were somehow related to an inadequate recognition of the corporate claims in which they have an interest. No such inadequacy is alleged, and there is no appeal from the decisions below that the plan includes a fair and equitable settlement of all corporate claims. In these circumstances, it is clear that the plan involves no discrimination against the common stockholders, and that the Common Committee has no legitimate concern with the payment by Cities to the class A stockholders provided by the plan."

For reasons already discussed we have not attempted to attack the Commission's determination with respect to the corporate claims, unfair and influenced as we believe that decision to have been by their determination with respect to the separate non-derivative, non-corporate so-called "class" claim of the Class A stockholders.

But when the Commission violates the legal right of the common stockholders to equal treatment with the A stockholders, not as a determination based on conflicting facts

but on a wrongful determination and misapplication of legal principles, the error is one of law and fully subject to review here, and the common stockholders who are by law entitled to equal treatment have been injured.

To say that the common stockholders would gain nothing if the claim of the Class A stockholders were to have been denied by the Commission begs the whole question. *As stockholders of equal right they were enttiled to equal treatment, and if they have been denied that on anything other than proper legal grounds, they have every right to complain and to seek correction of the injustice.*

We submit that the statements above in the Commission's brief that the Common stockholders are not concerned with, are not affected or injured by the separate payment to the Class A stockholders are completely sophistrous. If the Commission, and Cities at its bidding, can allocate payment to one of two legally equal groups of stockholders on the basis of "a class claim" which does not exist, then the Commission should be permitted to make any determination on any basis whether in accordance with legal standards or not under the guise of the magic words "approval of a settlement."

It is claimed by the respondents that the payment to the Class A stockholders is not at the expense of the Common stockholders and therefore they are not injured. Only the more naive will accept the inference that this gratuitous allocation to the group is not at the expense of the other.

The iteration and reiteration of a claim does not give it validity—at least we hope—and the mere characterization of it as a "class" claim does not make it so without some semblance of legal basis therefor. Absent some legal basis, the additional payment of $1.25 per share to the Class A stockholders is a gratuity and a windfall and as such a violation of the equal treatment of their rights that all other stockholders with equal contract rights are entitled to from both the Commission and this Court.

No one can honestly say that the payment is not at the expense of the Common stockholders, namely that by so much the amount payable by Cities on account of the admitted "corporate" claims of Arknat has not been reduced.

This is not a matter of largesse by Cities to be allocated as it and the Commission please, and if it were, as the sophistrous statement in the Commission's brief would infer, it could only be paid to all and not to some of those whose contract rights are equal.

Derivative corporate claims in excess of $50,000,000 were asserted in the proceedings before the Commission against Cities. If they were properly evaluated and the corporate wrongs redressed, the Common stockholders would undoubtedly have received a greater share. The president of Cities, Mr. Jones' concern about the total amount to be paid (18a) and the Commission's concern about punishing the wrongdoer and not permitting it to go scot-free[2] would still result in at least the same total payment, in which

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[2] At the argument held in Wilmington on November 21, 1952, the Commission's counsel told Maris, C. J. (p. 122):

> "The Court: What about the proposition that of this amount $1.25 is being awarded to the present owners of the Class A stock?
>
> "Mr. Isaacs: That, your Honor, is an inherent problem involved in all claims, whether corporate or class. In a world where things happen over a twenty-year period, you can't do perfect justice on a twenty-year old claim of damage to a class of security holders or damage to a corporation. Holders of the securities change, and *the basic problem is whether that is a reason for letting the wrongdoer go scot-free or whether you take as a theory that there is a class or corporate right to recovery and thus permit the present stockholders to stand in the shoes of their predecessors.* The common stock as well as the Class A stock has changed hands during this interval, Arkansas Natural as a corporate entity is disappearing before this money is to be paid. So you are really not paying anything to the corporation." [Italics supplied.]

event all public stockholders would have received slightly less than the $1.50 per share now paid solely to the Class A stockholders.

Mr. Ruch, in Cities brief before the Commission dated April 2, 1952, certainly considered the public Common stockholders aggrieved when he said (p. 48):

> "Moreover, in the process of penalizing Cities, the effect is simply to penalize the innocent public holders of its common stock."

Matter of Green Bus Lines, 166 Misc. 800 (New York Sup. Ct., 1937) furnishes an apt analogy to the situation here. An election of directors was attacked because it did not conform to law. The claim that the petitioners were not aggrieved because they supported defeated candidates and the result would still be the same if a new election were held, was disposed of as follows:

> "* * * In addition to the facts set forth they claim that petitioner is really disinterested in the proceeding, and brings the action on behalf of the defeated candidates for directer. Proof to support the contention is lacking. Even if it were present, it is hard to see how it can affect the situation. The requirements of justice, as intended in the statute, do not entitle a particular judge hearing the petition to determine whether or not the balance of equities or his own conception of fairness should determine the result. *What must be decided is whether the election has been held in accordance with the governing provisions of law."* (Italics added.)

In the instant case it is not difficult to predict what the Commission would have done or will do upon a remand if it cannot "take as a theory"[3] that a class claim could

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[3] See statement of Mr. Isaacs, n.2, p. 13.

be asserted and adjusted accordingly. The desire of the Commission to punish the wrongdoer and the willingness of Cities to settle all claims in a total amount would still be the important motivating considerations.

To accomplish the purpose of penalizing the wrongdoer so it would not go Scot-free an absurd and completely invalid legal ground was adopted: namely "You take as a theory that there is a class or corporate right to recovery and thus permit the present stockholders to stand in the shoes of their predecessors." The Commission could just as easily "take" the theory that the present stockholders are the adopted children of the original purchasers and therefore inherited their rights from their foster parent stockholders. The theory taken by the Commission is just as ridiculous and disregards *pari passu* treatment of stockholders of equal rank. The Commission's determination was made "not in accordance with legal standards"[4] but unless reversed by this Court will be conclusively binding on the petitioners.

In *Cohan* v. *Elder,* 118 F. 2d 850 (C. A. 9, 1941) the Court defined the meaning of the term "aggrieved" as follows:

> "* * * The word 'aggrieved' as used in the statute is doubtless to be understood in its legal sense, as in the case of a party who is aggrieved by an order made or action taken in a judicial or administrative proceeding which is binding on him."

See also *American Surety Co.* v. *Jones,* 51 N. E. 2d 122, 384 Ill. 222 and *Glas* v. *People,* 102 N. E. 763, 259 Ill. 332, where the Court said:

> "* * * a person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment."

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[4] *S. E. C.* v. *Central Illinois,* 338 U. S. 96, 126.

In *Pierce* v. *Gould,* 9 N. E. Reporter 568, the Supreme Judicial Court of Massachusetts said:

> "The common stockholders are concluded by the findings of the Commission unless reversed by this Court and by the same token have an interest in, are prejudiced by and are aggrieved because of the findings of the Commission and the order of the District Court."

In *Beachler* v. *Ford,* 60 N. E. 2d 330, 337, it was argued that the defendant was not an aggrieved person because he would have received a greater amount under the judgment but the Court said:

> "Whether the appellant E. T. Ford would be pecuniarily benefitted by the relief that might be afforded him on his appeals is not a proper test for determining whether he was 'aggrieved' by the judgments overruling his motions to vacate, but the true test is whether legal rights of the appellant were invaded by the orders overruling such motions."

In the present case the Commission violated the rights of the Common stockholders to receive *pari passu* treatment whether in the distribution of a corporate claim or consideration of private wrongs based on the same stock market manipulations in both stocks.

If the basis of the Class A claim is predicated on the common law rights of purchasers of stock in an inflated market because of fraudulent misrepresentations as both the Commission and the Class A stockholders assert, then by the same standards the public Common stockholders who purchased their stock in the same inflated market have a claim for which nothing has been paid and on that basis alone are interested and aggrieved parties.

If we could turn the clock back to 1929 and 1930 and assume that a common stockholder during said period brought suit against Cities because he paid $25 or $26 per

share due to the manipulation, fraud, and misrepresentations of Cities in the sale of common stock, would any reasonable person then have argued that (1) the common stockholder had no cause of action because Cities was principally engaged in the sale of A stock and the sale of common was merely an adjunct of such sales or (2) that the monies Cities received went into its own treasury whereas the monies received for the sale of Class A went into Arknat's treasury or (3) that no cause of action existed because by the sale of A stock the common stockholders who had their stock *prior to May 1, 1929* received a benefit by enhancement of their equity. Such defenses would then have been obviously insufficient. The passage of some twenty years does not make them better.

POINT II

The Court has the right and duty to examine the Commission's Conclusions of Law.

In his opinion Judge Maris, after reviewing the facts, the claims made by the Committees, and the purported settlement under the plan approved by the Commission states:

> "Before considering these contentions it should be noted that the problem presented to me is not to adjudicate the validity of the claims in controversy. The question is rather whether it was appropriate for the Commission to dispose of them through settlement under the terms of the amended plan rather than through the normal processes of litigation and, if so, whether the fairness of the settlement provided for by the amended plan is supported by substantial evidence."

We respectfully submit that this is an erroneous statement of the "problem presented" to both Judge Maris and the Commission.

We have not questioned the right of the Commission to adjudicate and settle claims, and we have striven to avoid having the issue here lost in the cloud of any such synthetic controversy.

We do vigorously oppose the right of the Commission to allocate the proceeds of a settlement upon a claim which has no legal basis or validity and accordingly cannot be said to exist, no matter how often or loudly reiterated by its proponents.

Neither Congress in the Public Utility Holding Company Act nor any decision of the Supreme Court or of any other federal court ever determined or indicated that the Commission could sit as a prize court to divide up booty. That is precisely what the Commission has done here. It is that power and right to divide spoils which the Commission is seeking to establish and maintain.

It is the failure of the Commission and the Courts below to face that issue that brings us here.

The findings of the Commission as to the facts on which the alleged claim is based may be sacrosanct, but its findings as to the legal consequences or rights of action flowing therefrom are not and accordingly are subject to the scrutiny and judgment of this Court.

As stated by Mr. Justice Frankfurter in the first *Chenery* case (*S. E. C.* v. *Chenery Corporation, et al.*, 318 U. S. 80), at page 87:

> "• • • Since the decision of the Commission was explicitly based upon the applicability of principles of

equity announced by the courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

And again at pages 89-90:

"* * * Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked. And judged by those standards, *i. e.*, those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established legal principles."

In its opinion in *S. E. C.* v. *Cogan*, 201 F. 2d 78, 85 (Dec. 22, 1952), the 9th Circuit Court of Appeals holds likewise (p. 83):

"* * * the Commission was laying down a rule of law and making a determination of legal issues. Its decisions in that regard are subject to judicial review and determination."

The Commission having decided that the Class A stockholders were entitled to a disproportionate payment because there was (a) a breach of a fiduciary obligation from Cities to said Class A stockholders, (b) that a class claim could be asserted by them, and (c) that they were entitled to the rights of their predecessors in interest without a specific assignment, similarly laid down rules of law and made legal determinations which this Court is not bound to accept.

POINT III

The marketing of the Arknat Class A stock by Cities involved no breach of fiduciary duty to the purchasers.

The record here is abundantly clear as to the basis on which the Commission holds the Class A stock entitled as a class to the disparate payment of $1.25 per share. At page 48 of the Commission's findings and opinion (62a) it states that:

> "Turning to the class claim of the public Class A stockholders stemming from Cities' activities in marketing the Class A stock in 1929 and 1930, we find it clear from the record that the market prices paid by the purchasers of the stock were artifically inflated as a result of Cities' activities, which involved fraudulent misrepresentations and omissions and a manipulation of the market which would have been actionable under general legal principles apart from the relevant provisions contained in the Securities Exchange Act of 1934."

The cases relied on by the Commission are properly cited for the proposition that fraudulent misrepresentation in the sale of stock is actionable apart from the provisions of sections 9(a) and 15(c)(1) of the Securities Exchange Act of 1934 (but not by the purchasers' transferees some 25 years later, see Point IV (c), p. 1 *post*).

But the Commission then continues:

> "In our opinion such sale of Class A stock to the public *constituted a breach of fiduciary duty* to the purchasers as a class requiring equitable readjustment in this reorganization." (Italics added.)

This being the basis found by the Commission for the payment of the extra $1.25 per share to the public Class A stockholders, the validity of the payment must be judged by the correctness of that finding. As stated by Mr. Justice Frankfurther in the first *Chenery* case referred to and quoted above, "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

Here the Commission reveals the mistake which lies at the root of its difficulty. At the time of the sale of the Class A stock, Cities simply did not owe a "fiduciary duty to the purchasers as a class." At that time the purchasers did not exist as a class. Moreover, examining the marketing operation at the time of each sale, it is seen that the requisite elements of fiduciary relationship, *i. e.*, a beneficiary on the one hand, on the other hand a trustee, and between them a *res*, or subject of the pronounced fiduciary duties, were absent. Cf. *Gough* v. *Satterlee*, 32 N. Y. App. Div. 33 (1898); *Madget* v. *Madget*, 85 Ohio App. 18 (1949); *Inter-Ocean Casualty Co.* v. *Lecony Smokeless Fuel Co.*, 123 W. Va., 5411 (1941); 1 Restatement, *Trusts* § 74 (1935); Bogert, *Trusts*, 3, 502; all holding that a trust *res*, or property, is essential to a trust relationship. No *res* existed with respect to which buyer and seller were related as fiduciary and beneficiary. Cities (through its subsidiary, Henry Doherty & Co.) as seller, held the stock, which it offered for sale. The prospective purchaser held his money. There was no fiduciary relationship.

Only after the sale could it be said that Cities stood in a fiduciary relationship to the public holders of the Class A and then only because of its dominant position in Arknat. It could be said that after the sale, for example, Cities as controlling stockholder of Arknat, had a fiduciary duty not to waste the *res* of the relationship, *i. e.*,

the assets of the corporation, or mismanage the corporation to its injury. But Cities' activities after conclusion of the marketing operation is not the basis of the Class A claim.

At the time of the marketing operation, the relationship between Cities and prospective purchasers was simply one of buyer and seller. As to each prospective purchaser, Cities' duty was to refrain from making fraudulent misrepresentations. The Commission correctly points out that Cities did not do so. So the real questions involved are whether the initial purchaers of the Class A stock all suffered actionable injury, and if so, whether their rights of action were transferred to the present holders. These questions will be examined in Point IV of this brief.

The cases cited (62a p. 49) by the Commission (*Pepper* v. *Litton*, 308 U. S. 295, 307, and *American Insurance Co.* v. *City of Avon Park*, 311 U. S. 138, 146), in support of its theory that the sale by Cities of the Class A stock constituted a breach of fiduciary duty requiring equitable readjustment do not by any means support the Commission's theory.

The Commission's misconstruction of the applicability of *Pepper* v. *Litton* is apparently the same here as it was in the first *Chenery* case where this Court stated at page 85:

> "* * * to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"
>
> * * * * * * *
>
> "* * * The cases upon which the Commission relied do not establish principles of law and equity which in

themselves are sufficient to sustain its order. The only question in *Pepper* v. *Litton*, 308 U. S. 295, was whether claims obtained by the controlling stockholders of a bankrupt corporation were to be treated equally with the claims of other creditors where the evidence revealed a 'scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c. 5 was designed to cope,' 308 U. S. 25, 296."

The second case, *American Insurance Co.* v. *City of Avon Park*, cited by the Commission is similarly inapposite and inapplicable. There the fiscal agent under a plan for the composition of debts of a municipality under Chapter IX of the Bankruptcy Act, solicited assents to the plan without disclosing that it was acting in a dual capacity as a creditor of the municipality as well as its fiscal agent.

Following its above quoted finding as to a breach of fiduciary duty by Cities, the Commission next adverts to "special equities" possessed by the Class A stockholders. It is clear however that this finding is likewise based on the marketing by Cities of the Class A stock and is in effect merely a reiteration in different words of the previous finding (Com. F. & O. 62a, p. 49):

> "* * * As we have seen, the Class A stockholders possess special equities based on injuries resulting from the marketing by Cities of the Class A stock. * * *"

We submit that whatever wrongs may have been committed by Cities upon the original purchasers of Class A stock, no fiduciary relationship existed or was breached, and the individual and several causes of action at law for fraud and deceit accruing to the original purchasers are not involved in or properly a part of the present reorganization proceedings.

POINT IV

The Class A stockholders have no "class" claim.

The action of the Commission in arbitrarily diverting substantially all of the payment made by Cities to the Class A stockholders must stand or fall on the establishment of their right to a personal, non-derivative, "class claim."

The disparity in the aggregate amounts payable under the amended plan to the Class A stock and the Common stock is much greater than the six-times differential between the 25¢ and $1.50 per share payments. According to Cities Ex. 32 (49a), 2,612,171 shares of Class A would be entitled to receive the $1.50 per share payment, or an aggregate of $3,918,265.50, and 604,049 shares of Common would be entitled to receive 25¢ per share, or an aggregate of $151,012.25—or 96+% of the total claims payment to the former and 3.71% to the latter.

That it was the Commission and not Cities or Arknat which made the allocation can hardly be denied.

Mr. A. H. Weyland called as a witness on behalf of Ark-Nat in support of the Plan testified (13a).

> "It is my understanding that when Cities offered this $4,000,000, it was a compromise offer to Class A and common stockholders. They were offering that to settle all outstanding claims, whether stockholders' claims or corporate claims, or claims of any nature, and they were making it as a compromise offer to settle everything.
>
> "On that basis it suited me fine, since Arkansas was not putting any part of that $4,000,000."

Mr. Christian, Treasurer of Cities, similarly failed to evaluate any claim or to allocate any portion of the

$4,000,000 in settlement of a particular claim (14a). He was cross-examined at length and, after setting forth the general nature of the offer of compromise, testified as follows (T. 2986):

> "Q. Did you have any discussion or did you ever hear any discussion regarding any amount to be allocated to a particular claim in making up this $4,000,000? A. No, sir.
>
> Q. Who was it that made the determination that this $4,000,000 should be offered in settlement of the claim? A. I don't know who made the determination that that was to be 25 cents and $1.50.
>
> Q. I am sorry, I didn't hear that. A. I said I did not know who determined that 25 cents and $1.50 was the allocation.
>
> Q. Did you have any discussions with Mr. Jones after the meeting of November 9 regarding this offer of settlement? A. No, sir.
>
> Q. Did you have any discussions with Mr. Walker regarding this offer of setttlement? A. No, sir."

Mr. Jones, President of Cities Service, took refuge behind the attorneys who he claimed prepared the Plan, namely, Messrs. O'Brien, Weiner, and Ruch (T. 3220), but he personally, was unable to appraise the value of any particular claim. When questioned specifically on cross-examination as to the breakdown of the $4,000,000 offer of compromise he denied any knowledge whatsoever as to the component parts (T. 3233):

> "Q. You never received any breakdown of how this $4,000,000 was arrived at? A. No, I didn't. I told you that."

(P. 3229):

> "Q. Did you get any memorandum from the lawyers showing the maximum liability of any particular claim? A. I did not. I didn't ask for it.

Q. Did you ask them how they arived at the figure of $4,000,000? A. No, I don't think I did. I don't believe I asked them how they arrived at it. They told me that they had considered the character of all of the claims and felt that this offer in compromise was one that we could justify making."

Mr. Ruch, attorney for Cities, admitted on the argument before the District Court and in the Court of Appeals that Cities had objected to the differentiation between the Common and Class A stockholders and had asserted before the Commission that there could be no "class" claim for the A stockholders because only those few present holders who bought within the limited period of stock market manipulation could have any legal grievance. In accord with this Cities' main brief before the Commission forcefully stated (p. 46):

> "The claim that the holders of A Stock some 23 years later have an equity in the assets of Ark-Nat superior to that of the Common Stock is unsupported by any recognized rules of law or equity, and is also unsupported by any moral or ethical considerations. * * * Moreover, in the process of penalizing Cities, the effect is simply to penalize the innocent public holders of its common stock."

(a) Even the initial purchasers of Class A stock did not have a class claim; but rather separate actions for fraud and deceit.

So far as any purchaser of the class A stock during this period of the marketing operation suffered actionable injury, his remedy is in an action at law for fraud and deceit, which is necessarily a personal action. For on the one hand the remedies available to a successful complainant are several, *e. g.*, rescission or damages, and on the other hand the existence of the injury is particular to the plaintiff and consists in his reliance to his injury upon the fraudulent misrepresentation.

A convenient summary of the law on the point is set forth in 114 A. L. R. 1015, at page 1016, where the annotator says:

> "Class or representative suits to obtain the rescission of transactions based on similar frauds practiced by one defendant upon various, and commonly numerous, persons, have so often been held not maintainable that one may well doubt whether under any circumstances such a suit will lie. One of the basic difficulties is not merely that the various transactions are legally distinct, but that each case is, or at least may prove to be, to some extent different. Even where the false representations were exactly the same, the various persons victimized may have acted upon different opinions and beliefs as to the facts; one may have relied upon one supposed fact, another upon a different one, and some may have largely acted upon their own judgment as to business possibilities, etc. Furthermore, each has an election of remedies, all may not desire the same relief, and some may not be entitled to any relief. In some case the interests of the various victims may be conflicting."

In accord:

> *George Brenner, et al.* v. *Title Guarantee & Trust Co.*, 276 N. Y. 230, 11 N. E. 2d 890 (1937).
> *Willcox* v. *Harriman Securities Corp.*, 10 F. Supp. 532 (S. D. N. Y. 1933).

Cases cited in Annotation, 114 A. L. R. 1015:

> *Wheatley, et al.* v. *A. I. Root Co., et al.*, 72 N. E. 2d 482 (Ohio Court of Appeals, Medina County, 1945).

One outstanding fact which seems to have been ignored by the Commission is that, 1,021,056.25 (plus 1,465 shares

on later adjustments) shares of the Class A stock were sold on rights to the Common stockholders at $4 per share. This amounts to almost ⅓rd of the total of 3,522,521.25 shares of Class A stock issued and outstanding and cannot now be segregated from the whole. The balance of 2,500,000 shares of A stock were sold by Cities Service Securities Co. over a period of months between June, 1929 and December 31, 1930, both through salesmen in the field and over the New York Curb market at prices ranging from $7.94 in June, 1929 to a high of $23.48 in September, 1929 and a low of $5.56 in December, 1930 (Com. Ex. 66), with the result that it can scarcely be said that the purchasers of these shares ever had any such uniform or generally similar claims that they can be said to have had a claim as a class, then or now.

At best, only the original Class A stockholders who purchased their stock in 1929 and still retain it, could be said to have the procedural benefit of a "spurious" class action under Federal Rules of Procedure with respect to their third party claim against Cities. *Zahn* v. *Transamerica Corp.* (3rd Cir., 1947), 162 F. (2d) 36; *Hackner* v. *Guaranty Trust Co.* (2nd Cir., 1941), 117 F. (2d) 95, 97-8; *Ayer* v. *Kemper* (2nd Cir., 1931), 48 F. (2d) 11, 14.

(b) No right of action for Cities market manipulation devolved upon Class A stockholders who are transferees of the original purchasers.

Assuming, for the purposes of argument that the purchasers of the Class A stock of Arknat from Cities in 1929 and 1930 could have been said to have had a class claim, it would of necessity have been based upon their individual personal claims against Cities and as such would now remain only in those present Class A stockholders who bought their stock at that time—any such claims would not devolve by operation of law from such purchasers to subsequent purchasers of the stock from them.

It is submitted that this is the basic fallacy of the proposed payment of $1.50 to the public Class A stockholders as against 25¢ to the public Common stockholders under the amended plan. *The fundamental distinction between personal or class claims, such as those which the purchasers of Class A or common stock during this period might have had or may still have (subject, of course, to the Statute of Limitations), and the derivative claims of Arknat as a corporation has been completely ignored, consciously or unconsciously.* Any payments made in settlement of the latter must legally and equitably be distributed to and among all of the stockholders equally and ratably in accordance with their contract rights *inter sese.*

At page 41 of its findings and opinion, the Commission states:

> "The Class A Committee further contends that the general rule is that, where a fraud claim is merely incidental to a subsisting property right which has been assigned, the right to sue for the fraud passes as an incident of the assignment."

The above is a flat misstatement of the law, as far as transfers of stock are concerned. It is interesting to note that the Commission recites but does not openly adopt this fallacious theory, although it does so indirectly because the result which it approves is of necessity predicated upon it.

In *Cook on Corporation* (Vol. II, 8th Ed., § 355, p. 1294), the author says:

> "A sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the party from whom the vendor purchased."

37 C. J. S., Fraud, Section 60(b), page 344:

> "A stranger to the transaction who does not claim under the party defrauded has no right of action.

> Thus where fraud occurred in the original sale of property, there can be no recovery for such fraud by a subsequent donee, grantee, trustee or purchaser."

The same rule was tersely stated in *Kennedy* v. *Benson*, 54 Fed. 836 as follows (p. 838):

> "The transfer of the stocks would not transfer the right of action for the damages caused by false representations. At common law, such a chose in action was not assignable, so as to enable the assignee to maintain an action at law in his own name thereon."

Also to the same effect:

Abel v. *Paterno*, 245 App. Div. 285 (1st Dept., 1935);

Elliott v. *Kern* (1928), 90 Ind. App. 453, 161 N. E. 662;

Huston v. *Ohio & Colo. Smelting & Refin. Co.* (1917), 63 Colo. 152, 165 Pac. 251;

Steele v. *Brazier* (1909), 139 Mo. App. 319, 123 S. W. 477.

Judge Leibell discussed and applied the foregoing rule of law *In re Associated Gas & Electric Co.*, 53 F. Supp. 107, 112 (S. D. N. Y., 1943), affirmed *sub. nom. Elias* v. *Clarke*, 143 F. (2d) 641.

Referring to Judge Leibell's above decision, the Commission in the Section 11(e) reorganization case entitled *In the Matter of Stanley Clarke, Trustee of Associated Gas & Electric Co.* (April 15, 1944, H. C. Rel. 4985), stated (p. 45):

> "* * * Judge Leibell * * * (as to original holders of certain securities) held that any right of rescission they might have was not available to others than Original Holders. * * * He pointed out that the instruments of assignment did not purport to transfer

> any rights other than those embodied in the * * * shares of stock themselves, and that these do not include a right of rescission for fraud practiced upon the assignor * * *.
>
> "On the basis of our independent consideration we concur in Judge Leibell's conclusions."

Neither of the Courts below, the Commission nor any of the parties to this proceeding have produced any legal authority to sustain the transfer of the choses of action possessed by the original purchasers without a specific assignment thereof which was accomplished here solely by administrative fiat. The challenge issued by petitioners to submit any such authority has yet to be met.

POINT V

Both classes of stockholders having equal contractual rights are entitled and required by law to receive equal treatment.

The two stocks here are identical in all respects except that the Common had voting rights for the election of directors and the Class A did not (Com. Ex. par. 6). Their contract rights with respect to dividends and assets are identical, and although the Commission and the Courts have held that in reorganizations under the Act charter rights are not controlling in the strict priority sense, nevertheless they are to be respected—and no case so far as known has held or even intimated that different shares of the same class (which the A and Common stock are here for all practical purposes) can be treated differently.

Discussing permissible classifications under a reorganization plan, *Finletter, Law of Bankruptcy Reorganization*, 1939, states (p. 467):

> "A Class A common stock with no voting rights but otherwise identical with Class B voting common stock is not a separate class."

The same authority further states that where there is such equality of legal claims there can exist no justification for a "difference of treatment in the plan or arrangement" (p. 465).

As this Court stated per Mr. Justice Douglas in *U. S.* v. *Joliet & Chicago R. Co.* (1942), 315 U. S. 44, 48:

> "All questions of the rights of creditors aside, there can be no doubt that a corporation may normally distribute its assets among its stockholders. When it undertakes to do so, its act is nonetheless a corporate act though its shareholders receive new contractual rights enforceable by them along against the transferee. That is to say, their right to receive the proceeds on the disposal of corporate assets are strictly derivative in origin. *The fact that the consideration is made distributive to them directly * * * does not alter the character of those rights.* In each case their claims to the proceeds flow from the corporation and are measured by the stake they have in it." (Italics added.)

The discrimination between the distributions here provided for the Class A and the Common stockholders is clearly violative of basic rules requiring parity of distributions and participation between stockholders of equal contract rights.

In *Standard Oil Co.* v. *Apex Oil Corp.* (1950), 190 Tenn. 376, 229 S. W. (2d) 775, 776, it was recently stated:

> "In making distributions to stockholders in corporate liquidations, no stockholder may acquire or gain a priority over another. * * * Stockholders have equal rights in the distribution of assets. * * *"

It is clear that contract rights of equality among stockholders may not be disregarded in a reorganization under

the Act as in any other statutory reorganization. Even were other pertinent precedents lacking, such controlling determination would follow *a fortiori* from the established rule that contract rights of priority may not be so disregarded. *Case* v. *Los Angeles Lumber Co.* (1939), 308 U. S. 106; *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.* (1942), 317 U. S. 78. The principle remains basic to determination of rights of participation in the assets of corporations in reorganizations under Sec. 11 of the Public Utility Holding Company Act. *In re Standard Gas & Electric Co.* (1945), 59 F. Supp. 274, 279, aff'd in pt. (3rd Cir., 1945), 151 Fed. (2d) 326; *In the matter of Engineers Public Service Co.* (December 5, 1946), H. C. Rel. 7041; aff'd sub. nom. *S. E. C.* v. *Central-Illinois* (1949), 338 U. S. 96, 130.

This Court in *Otis & Co.* v. *S. E. C.* (1945), 323 U. S. 624, made it clear that the principle applies to plans for simplification under the Public Utility Holding Company Act, and suggests the Supreme Court's fundamental aversion to any attempt to use the simplification machinery of the Act to create a "windfall" for one group of stockholders at the expense of another (*supra*, p. 637). An unfair taking and a "windfall" to the recipient occurs where, as here, such result would be destructive of vested contract rights of equality among stockholders. *In the Matter of Engineers Public Service Co.* (December 5, 1946), H. C. Rel. 7041.

In the analagous situation of a reorganization under Section 11 of the Bankruptcy Act, it has been stated that an important criterion of the fairness of a plan is that "there is no subtle appropriation of the property of one group for the benefit of another if the plan be effected." *In re Midland United Co.* (D. C. Del., 1944), 58 F. Supp. 667, 685.

Unless the fallacies upon which the findings and opinion of the Commission with respect to the amended plan are

recognized and repudiated by this Court, the misappropriation and unfairness proscribed by the above cited cases will have been accomplished here.

Conclusion

The Commission's findings, made contrary to established legal principles, are not immune from review by merely calling the allocation, made by the Commission of the fund offered by Cities to settle all claims of any nature whatsoever, a "private settlement" and by affixing a "class suit" label to a legally non existent claim. The holding of the Court of Appeals that the Public Common stockholders are not aggrieved gives full effect to form and ignores substance and reality. The amended plan is discriminatory and illegal insofar as it permits unequal treatment of shareholders having equal charter rights and in that regard should be disapproved and remanded to the Commission for revision according to law.

Respectfully submitted,

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